SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 894

MOSE REED,

Petitioner,

versus

M/V FOYLEBANK, her engines, tackle, apparel and furniture, and BANK LINES LIMITED and STRACHAN SHIPPING COMPANY,

Defendants.

OPPOSITION BY BANK LINES LIMITED TO PETITION OF MOSE REED FOR CERTIORARI

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MAY IT PLEASE THE COURT:

NOW INTO COURT comes Bank Lines Limited, claimant of the M/V FOYLEBANK, and files this, its opposition to the petition for certiorari by Mose Reed.

I.

THERE WAS NO IMPROPER PLAN

Petitioner's first thrust seeks to change a conclusion of fact by the District Court and affirmed by the Court of Appeal. The brief for petition for writ of certiorari to review the decision of the Fifth Circuit quotes part

of the opinion of the appellate court to set out the general facts. However, the Fifth Circuit specifically stated in its opinion as follows:

> "The ship, its equipment and appurtenances were in seaworthy condition, the crew was fit and *the method of loading adequate.*" (Emphasis supplied) 415 F. 2d 838, (5 Cir. 1969).

The Fifth Circuit confirmed the finding of fact which is final unless petitioner can prove that the finding was manifestly erroneous. This petitioner has failed to accomplish this. None of the vessel's gear failed, and none of the crew was in anywise negligent.

Counsel for petitioner attempts to insert or create the impression that there was an improper loading plan. This is done by relating the word "plan" to the trial judge's findings of fact where the word plan does not appear and attempts to give the impression that the trial judge found that an erroneous or faulty plan was used by the stevedores. The district judge did not find any improper loading plan. On the contrary, he found that Mose Reed was the only longshoreman who used his hook in an improper manner by pulling on the steel bands (Finding of Fact No. 5). The judge further explained that the use of a hand hook on the wooden crate corner was not an improper use of the hand hook, and that none of the other longshoremen who used hand hooks pulled on the steel bands and that all used the hand hooks by inserting them into the wooden crate corners (Finding of Fact No. 5). The trial court specifically found that the proximate

cause of the accident was not the loading plan, but the use by appellant of his hand hook on the steel band which caused the band to be "fractured, kinked or cut", and this is the reason the band parted (Finding of Fact No. 11).

Hence, an improper plan of loading was never found, but only that Mose Reed, petitioner herein, used his hand hook improperly by placing it under the steel band and pulling on the band instead of the wooden corners (Finding of Fact Nos. 5, 8, and 11). It is especially clear in this case that one was not to use hand hooks on the steel bands because of a notation on the packages "Use No Hooks" (Finding of Fact No. 4). It is not disputed that this crate was to be moved only eight to ten feet once landed, and it is clear from the testimony that longshoremen moved heavy crates up to 3,000 pounds short distances without the use of machinery (Transcript of trial, Page 5).

We therefore submit that the trial court held only that the use of a hand hook by Mose Reed, petitioner herein, kinked or cut the band, and that this act was the cause of the band parting and, further, that the band in question was only for containing the cargo on the wooden skid (Finding of Fact Nos. 10 and 11). Therefore, the use of a hand hook was the improper act, and this was not part of the plan of the stevedores to move the crate in question. The determination of putting the hand hook under the steel band was solely a decision reached by the petitioner. None of the other longshoremen so acted.

This court has found that there is no duty on the part of the vessel to provide an accident-free ship. *Mitchell v. Trawler Racer*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960). This is a question of fact, and this court has stated that in viewing a judgment of a trial court sitting without a jury in Admiralty, the Court of Appeal may not set aside the judgment below unless it is clearly erroneous. *McAllister v. United States*, 348 U.S. 19, 20, 99 L. Ed. 20, 24 (1954). The Fifth Circuit affirmed the trial court's decision and therefore followed this court's directions.

We therefore respectfully submit that there was no improper plan used by the stevedores, but only the negligence of one individual, the plaintiff himself, in carrying out a proper plan.

II.

OPERATIONAL NEGLIGENCE IS NOT PER SE UNSEAWORTHINESS AND THERE WAS NO NEGLIGENCE OR UNSEAWORTHINESS

Each case depends on the facts submitted to and found by the trial judge. Counsel for petitioner attempts to interpret the case of *Mascuilli v. United States*, 387 U.S. 237, 87 S. Ct. 1705, 18 L. Ed. 743 (May 22, 1967) so that any form of operational negligence creates unseaworthiness. This theory has not been accepted by even the Second Circuit as the per curiam decision shown in the petition for rehearing in *Candiano v. Moore-McCormack Lines, Inc.*, 386 F. 2d 444 (2 Cir. 1967) wherein the court discusses the present status

of the law and indicates that an unseaworthy condition was created prior to the accident thereby changing their original interpretation of *Mascuilli*. In the instant case there is no unseaworthy condition which was created.

Further, this court has consistently denied certiorari in cases involving operational negligence and has allowed the circuit courts decision (and the trial courts decision) to remain undisturbed.

After the *Mascuilli* decision, which was decided on May 22, 1967, this court denied a petition for rehearing on October 9, 1967, in *Foster v. Lykes Bros. SS Co.*, 389 U.S. 889, 88 S. Ct. 15. On June 5, 1967 (two weeks after the *Mascuilli* decision) the Second Circuit's opinion in *Fenton v. A/S Glittre*, 370 F. 2d 146 (2 Cir. 1966) this court denied petition for writs of certiorari, 387 U.S. 944, 87 S. Ct. 2077. Petition for writ of certiorari to review this court's decision in *Antoine v. Lake Charles Stevedores, Inc.*, 376 F. 2d 443 (5 Cir. 1967) was denied on October 9, 1967, 389 U.S. 869, 88 S. Ct. 145. Further, a petition for writ of certiorari to review the decision in *Dugas v. Nippon Yusen Kaisha*, 378 F. 2d 271 (5 Cir. 1967) was denied on December 18, 1967, 389 U.S. 1021, 88 S. Ct. 592. In the last mentioned case this court permitted the filing of an amicus curiae brief by the American Trial Lawyers Association which specifically urged the court to reverse Dugas on the basis of *Mascuilli* but this court refused to grant certiorari.

We therefore respectfully submit that the court should similarly deny certiorari in this case which, in effect, would confirm this court's decision in *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 80 S. Ct. 926, 4 L. Ed. 2d 941 (1960) wherein the court provided that the ship owner does have a duty to provide a seaworthy vessel, and that this is an absolute duty, but further held that a vessel has a duty only to furnish a vessel and appurtenances reasonably fit for their intended use.

CONCLUSION

Because of the reasons stated above, we respectfully submit to the Court that this is a case in which there was no improper loading plan and is a case of pure, instantaneous operational negligence on the part of the petitioner herein and that his own negligence of placing his hand hook under the wire band in question and jerking on same was the sole cause of the accident and the petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit should be denied.

Respectfully submitted,

_____

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PROOF OF SERVICE

I, Leon Sarpy, attorney for Bank Lines, Ltd., claimant of the M/V FOYLEBANK, and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I have served copies of the foregoing brief in opposition to petition for writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit on:

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by mailing a copy thereof, postage prepaid, addressed to their respective offices, this ____ day of December, 1969.

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